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Brief
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IN THE UNITED STATES PATENT & TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS & INTERFERENCES

Appeal No. : 2000-0300
Appellant : Russell F. MIZELL, III
Serial No. : 08/654,600
Filed : May 29, 1996
For : INSECT ATTRACTION AND CAPTURE DEVICE
Art Unit : 3643
Examiner : Kurt Rowan

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REPLY BRIEF

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Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

Pursuant to 37 CFR §1.193 Appellant herein responds to the Examiner's Answer dated April 8, 2003.

In the paragraph bridging pages 3 and 4 of the Examiner's Answer, it is stated:

“---Applicant argues the intended use of the trap is for stinkbugs and that Tedders is for pecan weevils. This is not persuasive since Tedders shows structure to perform the intended use. The claim does not say anything about allowing maximum light to enter the trap, only that the top portion is of a material which admits ambient light into the interior of the receptacle and onto the channel surface which Tedders clearly does. No mention is made in claim 13 that the system is highly light reflective. It should be pointed out that even dark colors can be translucent or transparent. Also, one skilled in the art would color the trap to bring in or attract the target species. Clearly Tedders is aware of the color that works the best for pecan weevils. And Tedders shows the structure that stinkbugs are attracted to. One skilled in the art would employ the color found to work best to attract the target species just as Tedders did---”. (emphasis added)

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The Examiner's remarks constitute an attempt to extrapolate the limited disclosure of Tedders into a teaching that was never intended by the authors of the reference. Moreover, the extrapolated teaching is one that a skilled artisan would never have gleaned from a fair reading of the reference. Thus, the Examiner repeatedly subverts the clear teachings of the reference, e.g., "Tedders shows structure to perform the intended use"; "Tedders clearly discloses the (admittance) of ambient light", and "Tedders shows the structure that stinkbugs are attracted to".

In fact, what Tedders actually discloses is a system for the attraction of pecan weevils; nothing more. Nowhere in the reference is there any mention of, or allusion to, stinkbugs. The "intended use" of the Tedders device referred to by the Examiner is the capture of pecan weevils and not stinkbugs. The Examiner attempts to twist the disclosure in Tedders a system suited for the capture of pecan weevils to one adapted for the capture of stinkbugs but must resort to reading into the reference elements clearly not disclosed by the reference; indeed, elements that are contraindicated by the reference.

In this regard, note the Examiner's description of the "top" of the system of Tedders as one that "clearly---admits ambient light". In actuality, Tedders does not describe the "top" of the system other than to characterize it as "a 2-l cylindrical plastic container". No mention is made of the ability of the "top" to admit ambient light. However, the remainder of the disclosure of the reference makes it clear that Tedders contemplates the use of a "top" that does not admit ambient light. As pointed out in the Brief on Appeal (pages 5-8), Tedders goes to great lengths in emphasizing that the "darker" the objects associated with the trap, the better the chances of attracting the intended target species, namely, pecan weevils. Attention is directed to the disclosure in the last paragraph of Tedders (page 29):

“---In addition to presenting a new type of weevil trap, this report provides evidence that a pecan weevil's instinct leads it not only to move upwards just after it emerges from the soil but to also seek out dark objects. This apparent preference for dark objects may be a behavioral trait that can be further utilized to control weevil populations and perhaps other closely related species as well---” (emphasis added).

It is impossible, in light of this disclosure by the authors of the reference, to extrapolate from the teachings of Tedders that the “top” should, or even could, be constructed of a material that admits ambient light into a trap inherently designed to be as “dark” as possible.

Finally, the Examiner's remark that Tedders “Tedders shows the structure that stinkbugs are attracted to” is completely nonsensical in light of the fact that the entire thrust of the reference is toward the capture of pecan weevils. As noted above, stinkbugs are not mentioned as a possible target species for the disclosed trap. Indeed, note the disclosure in the first full paragraph of page 29 that the Tedders traps:

“---were found to collect many other species of arthropods including various spiders, larvae and pupae of Chrysoperla rufilabris (Brumeister), larvae and adults of Qua u.nigrum (Mulsant), vegetable weevils, Listoderes difficilis Germar, Fuller rose beetles, Asynonychus godmani Crotch, the cricket Gryllus rubens Scudder, and the larvae and adults of the recently introduced lady beetle, Harmonia axyridis (Pallas)---”.

If the Examiner's characterization of the disclosure of the reference were correct, stinkbugs would be among those reported by Tedders as possible target species for the disclosed trap. The fact that stinkbugs are not mentioned is clear and convincing evidence that the Examiner is not on firm ground with respect to the stated ground of rejection.

For the reasons presented herein and in the Brief on Appeal, therefore, it is respectfully requested that the final rejection of record be reversed and the application remanded to the Examiner for immediate allowance.

Respectfully submitted,

MILES & STOCKBRIDGE

A handwritten signature in black ink, appearing to read 'Dennis P. Clarke', is written over the firm name.

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